

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BERNARD LEE HAMILTON,

Plaintiff,

v.

G. THOMSON, et al.,

Defendants.

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No. 09-00648 CW

ORDER FOR SERVICE  
OF SECOND AMENDED  
COMPLAINT AND  
GRANTING  
PLAINTIFF'S  
REQUEST FOR  
REFERRAL TO PRO SE  
PRISONER EARLY  
SETTLEMENT PROGRAM  
(DOC # 5)

On February 13, 2009, pro se Plaintiff Bernard Lee Hamilton, a state prisoner incarcerated at San Quentin State Prison (SQSP), filed a civil rights complaint against numerous defendants who are employed at SQSP. On March 6, 2009, Plaintiff paid the \$350.00 filing fee. On March 13, 2009, Plaintiff filed an amended complaint. On March 25, 2009, Plaintiff filed a request to refer his case to the Pro Se Prisoner Early Settlement Program. On November 19, 2009, the Court issued an Order dismissing the complaint with leave to amend because the Court could not "glean from the numerous paragraphs in Plaintiff's amended complaint what his claims are and what relief he seeks."

On December 11, 2009, Plaintiff filed a Second Amended Complaint (SAC). In the SAC, he has followed the Court's order

1 that he "file a simple, concise and direct complaint which states  
2 clearly and succinctly each claim he seeks to bring in federal  
3 court."

4 I. Review Under 28 U.S.C. § 1915A(a)

5 A federal court must conduct a preliminary screening in any  
6 case in which a prisoner seeks redress from a governmental entity  
7 or officer or employee of a governmental entity. 28 U.S.C.  
8 § 1915A(a). In its review, the court must identify cognizable  
9 claims and dismiss any claims that are frivolous, malicious, fail  
10 to state a claim upon which relief may be granted or seek monetary  
11 relief from a defendant who is immune from such relief. Id.  
12 § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally  
13 construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
14 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a  
15 plaintiff must allege two essential elements: (1) that a right  
16 secured by the Constitution or laws of the United States was  
17 violated, and (2) that the alleged violation was committed by a  
18 person acting under the color of state law. West v. Atkins, 487  
19 U.S. 42, 48 (1988).

20 According to the allegations in the SAC, Plaintiff is mobility  
21 impaired and disabled as defined by the Americans with Disabilities  
22 Act, 42 U.S.C. § 12101 et seq. (ADA) and Defendants are aware of  
23 this. Nevertheless, on a number of occasions, Defendant G. Thomson  
24 insisted Plaintiff was not disabled and required him to stand at  
25 "count time," which Plaintiff was unable to do because of his  
26 disability. Defendant Thomson issued a number of rules violation  
27 reports against Plaintiff for his failure to stand at "count time."

1 Plaintiff appealed Thomson's disciplinary reports. As a result of  
2 that appeal, Defendants C.J. Henson and Robert Ayers filed a false,  
3 defamatory report against Plaintiff indicating that he did not  
4 stand at "count time" because Defendant Thomson is a woman and  
5 Plaintiff has a lack of regard for female authority figures.

6 Plaintiff is medically required to be on oxygen support  
7 twenty-four hours a day. It is medically necessary that his  
8 oximetry be monitored by computer. Plaintiff filed a previous  
9 case, Hamilton v. Adamik, No. C 06-6268 CW, regarding Defendants'  
10 failure to provide him with a computer. A settlement conference  
11 was held, with Magistrate Judge Nandor Vadas presiding. The  
12 parties reached an agreement whereby Defendant Tootell, Chief  
13 Medical Officer of SQSP, agreed to issue Plaintiff a permanent  
14 medical chrono allowing him to have a laptop computer. In  
15 exchange, Plaintiff agreed to dismiss the lawsuit with prejudice.  
16 However, Defendants never provided the laptop to Plaintiff. In  
17 2007, Plaintiff filed an appeal again requesting that Defendants  
18 provide him with a laptop computer to use with his medical  
19 monitoring equipment. Various Defendants denied the appeal,  
20 although they were aware that Plaintiff needed the laptop computer  
21 for his serious medical needs and that the settlement agreement of  
22 case number C 06-6268 CW required them to provide him with a  
23 computer. Magistrate Judge Vadas conducted a second settlement  
24 conference between Plaintiff, Defendant Tootell and Defendant's  
25 counsel. Defendant Tootell again admitted that the laptop was  
26 medically necessary and agreed to issue Plaintiff a permanent  
27 medical chrono for the laptop computer, which she did. However,

1 Plaintiff never received the laptop computer and, on December 5,  
2 2008, Defendant Tootell rescinded the chrono for it. On January  
3 19, 2009, Plaintiff appealed that decision. As a result of  
4 Defendant Tootell's actions, Plaintiff suffered further medical  
5 complications and, on September 29, 2009, he nearly died from these  
6 complications.

7 On July 15, 2009, Plaintiff refused to leave his cell when  
8 requested because he did not have his medically necessary oxygen  
9 support. Defendant Chan issued a rules violation report based on  
10 Plaintiff's refusal to comply with orders to leave his cell.  
11 Defendant Trujillo reprimanded Plaintiff for not complying with  
12 orders to leave his cell and stated that Plaintiff is not so sick  
13 as to require oxygen support.

14 Based on these allegations, Plaintiff states the following  
15 cognizable claims: (1) violations of the ADA; (2) retaliation under  
16 the ADA; (3) violation of the First Amendment based on retaliation  
17 for filing appeals of disciplinary reports; (4) violation of the  
18 Eighth Amendment for deliberate indifference to his serious medical  
19 needs; and (5) breach of contract based on the agreement settling  
20 case number C 06-6268 CW.

21 Plaintiff fails to state a claim for violation of his rights  
22 under the Fourteenth Amendment because he has not stated that he is  
23 a member of a protected class or that any Defendant discriminated  
24 against him based upon his membership in a protected class and he  
25 has not stated how any Defendant violated his right to due process  
26 of law. Plaintiff also fails to state a claim for defamation. See  
27 Paul v. Davis, 424 U.S. 693, 701-710 (1976) (damage to reputation  
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1 is not actionable under § 1983 unless it is accompanied by "some  
2 more tangible interests."); Franklin v. Oregon, 662 F.2d 1337, 1344  
3 (9th Cir. 1981) (no federal subject matter jurisdiction over claim  
4 of slander by state actor because no violation of federal right).  
5 To state a claim for defamation under § 1983, a plaintiff must  
6 allege loss of a recognizable property or liberty interest in  
7 conjunction with the allegation of injury to reputation. Cooper v.  
8 Dupnik, 924 F.2d 1520, 1532 (9th Cir. 1991). Plaintiff has failed  
9 to state facts alleging that he lost a recognizable property or  
10 liberty interest as a result of Defendants' defamatory statements.

11 Defamation is also a state tort claim. The Court may  
12 adjudicate state tort claims only through supplemental  
13 jurisdiction, which is discretionary, and should only be used to  
14 promote judicial economy or convenience. 28 U.S.C. § 1367; United  
15 Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). The  
16 Court declines to exercise supplemental jurisdiction over  
17 Plaintiff's state law defamation claim because it does not appear  
18 to be related to his federal claims.

## 19 II. Pro Se Prisoner Settlement Program

20 The Northern District of California has established a Pro Se  
21 Prisoner Settlement Program. Certain prisoner civil rights cases  
22 may be referred to a neutral magistrate judge for settlement  
23 proceedings. Good cause appearing, Plaintiff's request for a  
24 referral of this action to the Pro Se Prisoner Settlement Project  
25 (Docket # 5) is granted, and the present case will be REFERRED to  
26 Magistrate Judge Nandor Vadas for settlement proceedings pursuant  
27 to the Pro Se Prisoner Settlement Program. The proceedings will  
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1 consist of one or more conferences as determined by Magistrate  
2 Judge Vadas. The conferences shall be conducted at SQSP with  
3 Plaintiff and Defendants or representatives for Defendants.

4 The proceedings shall take place within ninety (90) days after  
5 the date of this Order; or as soon thereafter as is convenient to  
6 Magistrate Judge Vadas' calendar. Magistrate Judge Vadas shall  
7 coordinate a time and date for a settlement proceeding with all  
8 interested parties and/or their representatives and, within ten  
9 (10) days after the conclusion of the settlement proceedings, file  
10 with the Court a report regarding the settlement proceedings.

#### 11 CONCLUSION

12 For the foregoing reasons, the Court orders as follows:

13 1. Plaintiff has stated cognizable claims for:

14 (1) violations of the ADA; (2) retaliation under the ADA;  
15 (3) violation of the First Amendment based on retaliation for  
16 filing appeals of disciplinary reports; (4) violation of the Eighth  
17 Amendment for deliberate indifference to his serious medical needs;  
18 and (5) breach of contract based on the agreement settling case  
19 number C 06-6268 CW.

20 2. Plaintiff's federal equal protection and defamation  
21 claims are DISMISSED. The state defamation tort is dismissed  
22 without prejudice to refile in state court.

23 3. Plaintiff's request for this action to be referred to the  
24 Pro Se Prisoner Settlement Program (docket no. 5) is GRANTED.

25 4. The Clerk of the Court shall mail a Notice of Lawsuit and  
26 Request for Waiver of Service of Summons, two copies of the Waiver  
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1 of Service of Summons, a copy of the complaint and all attachments  
2 thereto (docket no. 1) and a copy of this Order to: G. Thomson, S.  
3 Odom, E. Berke, Robert Ayers, J. Arnold, J. Hill, D. Padilla, C.  
4 Hammond, B. Sullivan, E. Allen, Michael Henson, N. Grannis, N.  
5 Podolsky, C. Dole, J. Clark, T. Jackson, E. Tootell, T.N. Falconer,  
6 D. Matteson, R. Chan, Robert Wong, and A. Trujillo. The Clerk of  
7 the Court shall also mail a copy of the complaint and a copy of  
8 this Order to the State Attorney General's Office in San Francisco.  
9 Additionally, the Clerk shall mail a copy of this Order to  
10 Plaintiff.

12 5. Defendants are cautioned that Rule 4 of the Federal Rules  
13 of Civil Procedure requires them to cooperate in saving unnecessary  
14 costs of service of the summons and complaint. Pursuant to Rule 4,  
15 if Defendants, after being notified of this action and asked by the  
16 Court, on behalf of Plaintiff, to waive service of the summons,  
17 fail to do so, they will be required to bear the cost of such  
18 service unless good cause be shown for their failure to sign and  
19 return the waiver form. If service is waived, this action will  
20 proceed as if Defendants had been served on the date that the  
21 waiver is filed, except that pursuant to Rule 12(a)(1)(B),  
22 Defendants will not be required to serve and file an answer before  
23 sixty (60) days from the date on which the request for waiver was  
24 sent. (This allows a longer time to respond than would be required  
25 if formal service of summons is necessary.) Defendants are asked  
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1 to read the statement set forth at the foot of the waiver form that  
2 more completely describes the duties of the parties with regard to  
3 waiver of service of the summons. If service is waived after the  
4 date provided in the Notice but before Defendants have been  
5 personally served, the Answer shall be due sixty (60) days from the  
6 date on which the request for waiver was sent or twenty (20) days  
7 from the date the waiver form is filed, whichever is later.

8  
9 6. Defendants shall answer the complaint in accordance with  
10 the Federal Rules of Civil Procedure. The following briefing  
11 schedule shall govern dispositive motions in this action:

12 a. No later than ninety (90) days from the date their  
13 answer is due, Defendants shall file a motion for summary judgment  
14 or other dispositive motion. The motion shall be supported by  
15 adequate factual documentation and shall conform in all respects to  
16 Federal Rule of Civil Procedure 56. If Defendants are of the  
17 opinion that this case cannot be resolved by summary judgment, they  
18 shall so inform the Court prior to the date the summary judgment  
19 motion is due. All papers filed with the Court shall be promptly  
20 served on Plaintiff.

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22 b. Plaintiff's opposition to the dispositive motion  
23 shall be filed with the Court and served on Defendants no later  
24 than sixty (60) days after the date on which Defendants' motion is  
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1 filed. The Ninth Circuit has held that the following notice should  
2 be given to pro se plaintiffs facing a summary judgment motion:

3           The defendants have made a motion for summary  
4 judgment by which they seek to have your case dismissed.  
5 A motion for summary judgment under Rule 56 of the  
6 Federal Rules of Civil Procedure will, if granted, end  
7 your case.

8           Rule 56 tells you what you must do in order to  
9 oppose a motion for summary judgment. Generally, summary  
10 judgment must be granted when there is no genuine issue  
11 of material fact -- that is, if there is no real dispute  
12 about any fact that would affect the result of your case,  
13 the party who asked for summary judgment is entitled to  
14 judgment as a matter of law, which will end your case.  
15 When a party you are suing makes a motion for summary  
16 judgment that is properly supported by declarations (or  
17 other sworn testimony), you cannot simply rely on what  
18 your complaint says. Instead, you must set out specific  
19 facts in declarations, depositions, answers to  
20 interrogatories, or authenticated documents, as provided  
21 in Rule 56(e), that contradict the facts shown in the  
22 defendant's declarations and documents and show that  
23 there is a genuine issue of material fact for trial. If  
24 you do not submit your own evidence in opposition,  
25 summary judgment, if appropriate, may be entered against  
26 you. If summary judgment is granted [in favor of the  
27 defendants], your case will be dismissed and there will  
28 be no trial.

19 Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc).

20           Plaintiff is advised to read Rule 56 of the Federal Rules of  
21 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)  
22 (party opposing summary judgment must come forward with evidence  
23 showing triable issues of material fact on every essential element  
24 of his claim). Plaintiff is cautioned that because he bears the  
25 burden of proving his allegations in this case, he must be prepared  
26 to produce evidence in support of those allegations when he files  
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1 his opposition to Defendants' dispositive motion. Such evidence  
2 may include sworn declarations from himself and other witnesses to  
3 the incident, and copies of documents authenticated by sworn  
4 declaration. Plaintiff will not be able to avoid summary judgment  
5 simply by repeating the allegations of his complaint.

6 c. If Defendants wish to file a reply brief, they shall  
7 do so no later than thirty (30) days after the date Plaintiff's  
8 opposition is filed.

9 d. The motion shall be deemed submitted as of the date  
10 the reply brief is due. No hearing will be held on the motion  
11 unless the Court so orders at a later date.

12 7. Discovery may be taken in this action in accordance with  
13 the Federal Rules of Civil Procedure. Leave of the Court pursuant  
14 to Rule 30(a)(2) is hereby granted to Defendants to depose  
15 Plaintiff and any other necessary witnesses confined in prison.

16 8. All communications by Plaintiff with the Court must be  
17 served on Defendants, or Defendants' counsel once counsel has been  
18 designated, by mailing a true copy of the document to Defendants or  
19 Defendants' counsel.

20 9. It is Plaintiff's responsibility to prosecute this case.  
21 Plaintiff must keep the Court informed of any change of address and  
22 must comply with the Court's orders in a timely fashion

23 10. Extensions of time are not favored, though reasonable  
24 extensions will be granted. Any motion for an extension of time  
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1 must be filed no later than fifteen (15) days prior to the deadline  
2 sought to be extended.

3 11. This Order terminates Docket no. 5.

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5 IT IS SO ORDERED.

6 Dated: 3/18/2010



CLAUDIA WILKEN  
United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

BERNARD HAMILTON,

Case Number: CV09-00648 CW

Plaintiff,

**CERTIFICATE OF SERVICE**

v.

G. THOMSON et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 18, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Bernard Hamilton C-27300  
San Quentin State Prison  
San Quentin, CA 94964

Dated: March 18, 2010

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk